

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

In Re:	§	
	§	
DEEP MARINE HOLDINGS, INC.	§	Case No. 09-39313
et al.	§	
	§	Jointly Administered Chapter 11
	§	
Debtors.	§	
DEEP MARINE HOLDINGS, INC.,	§	
and DEEP MARINE TECHNOLOGY	§	
INCORPORATED	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	Adversary No. 10-3026
	§	
FLI DEEP MARINE LLC, BRESSNER	§	
PARTNERS, LTD., LOGAN	§	
LANGBERG, HARLEY LANGBERG,	§	ORAL ARGUMENT REQUESTED
and DEEPWORK, INC.	§	
	§	
Defendants.		

**DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' ORIGINAL COMPLAINT**  
**(Relates to Doc. No. 1)**

Defendants FLI Deep Marine LLC, Bressner Partners, Ltd., Logan Langberg and Harley Langberg (the "Defendants") respectfully move to dismiss the Original Complaint and Application for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction (the "Adversary Complaint") filed by Plaintiffs Deep Marine Holdings, Inc. and Deep Marine Technology Incorporated (together, "DMT" or the "Debtors"), pursuant to Rule 7012 of the Federal Rules of

Bankruptcy Procedure and Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state claim upon which relief can be granted. In support of their Motion, the Defendants state:

1. On October 26, 2009, the Defendants filed a complaint in Delaware Chancery Court (the "Delaware Complaint") asserting claims (the "Delaware Causes of Action") against the Debtors, as well as against Paul McKim, B.J. Thomas, Daniel Erickson, Francis Wade Abadie, Otto Candies, Jr., Otto Candies, III, Eugene DePalma, Larry Lenig, John Ellingboe, Bruce Gilman, John Hudgens, Nasser Kazeminy, DCC Ventures, LLC, NJK Holdings Corporation, NKOC, Inc., and Otto Candies, LLC (collectively, including the Debtors, the "Delaware Defendants").

2. On December 4, 2009 (the "Petition Date"), the Debtors and certain of their affiliates filed voluntary petitions for relief under chapter 11, Title 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Texas, Houston Division.

3. On that same day, the Debtors filed a Suggestion of Bankruptcy (attached hereto as Exhibit A) with the Delaware Chancery Court, notifying the Chancery Court and the Defendants that the Debtors had filed the voluntary bankruptcy petitions and that "after the Petition Date, no cause of action may be commenced or prosecuted, and no judgment may be taken, against any of the Debtors outside of the Bankruptcy Court . . . ." (Sugg. of Bankruptcy at 1)

4. Notwithstanding the fact that some of the causes of action asserted in the Delaware Complaint were claims asserted directly against the non-Debtor Delaware Defendants, on January 19, 2010, the Debtors filed the Adversary Complaint seeking a declaratory judgment that the Delaware Causes of Action are derivative in nature and property of the bankruptcy estate. A copy of the Adversary Complaint is attached as Exhibit B.

5. On January 21, 2010, the Court granted the Debtors a Temporary Restraining Order prohibiting the Defendants from further prosecuting any of the Delaware Causes of Action. The Court further ordered expedited discovery in order for the Defendants to properly prepare for the preliminary injunction hearing, now scheduled for March 30, 2010.

6. The Defendants seek to prosecute only those claims that are property of the Defendants, not those that are property of, belong to, or directly concern, the bankruptcy estate. For example, the third cause of action in the Delaware Complaint alleges breaches of fiduciary duties on the part of Nasser Kazeminy ("Kazeminy")<sup>1</sup> and Otto Candies<sup>2</sup>. Upon information and belief, Kazeminy and Otto Candies were at no relevant point officers or directors of the Debtors<sup>3</sup>.

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<sup>1</sup> In order to clarify the issue of "ownership" of the Delaware Causes of Action, the Defendants have attempted to take Mr. Kazeminy's deposition, but Mr. Kazeminy has thus far avoided personal service of a subpoena.

<sup>2</sup> Otto Candies, Jr. and Otto Candies, III are father and son and together are the principals of Otto Candies, LLC. On information and belief, the shareholder of record for the DMT shares owned by the Candies was at all times Otto Candies, LLC. For ease of reference we refer to the controlling shareholder as "Otto Candies."

<sup>3</sup> Otto Candies, Jr. was apparently on the Debtors' Board for "about two weeks." (Exhibit C at 15:5)

7. Under Delaware law, controlling shareholders have long been held to stand in a fiduciary relationship to the non-controlling shareholders. See Kelly v. Blum, 2010 WL 629850 (Del. Ch. Feb 24, 2010) (“Controlling shareholders . . . owe certain fiduciary duties to minority shareholders”); see also Gentile v. Rossette, 906 A.2d 91, 103 (Del. 2006) (finding that “harm to the minority shareholder plaintiffs resulted from a breach of a fiduciary duty owed to them by the controlling shareholder”).

8. Thus, any causes of action asserted by the Defendants against Kazeminy or Otto Candies are direct claims that are property of the Defendants because they concern (a) the Defendants’ original investment in the Debtors, (b) the continuation of that investment, and (c) personal dealings and communications with Kazeminy and Otto Candies. Similarly, the causes of action for unjust enrichment, fraud/misrepresentations, and wrongful equity dilution are direct claims against Kazeminy and Otto Candies and the prosecution of such causes of action will not prejudice, nor are such claims property of, the bankruptcy estate.

9. The Defendants respectfully request that the Court reserve ruling on this Motion until after the Court renders its decision on the preliminary injunction, which, in many ways, addresses the same issues as are raised by this Motion.

10. The Defendants reserve the right to submit a supplemental brief in support of this Motion at a later date, prior to the Court rendering a decision on the Motion.

WHEREFORE, the Defendants request that the Debtors' Adversary Complaint be dismissed in its entirety, on the merits, and with prejudice, and that the bankruptcy stay be lifted vis-à-vis the non-Debtor Delaware Defendants.

Dated: February 26, 2010

Respectfully submitted,

PADUANO & WEINTRAUB LLP

/s/ Anthony Paduano

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 26, 2010, a true and correct copy of the foregoing document was served on all parties on the attached service list by electronic means as listed on the court's ECF noticing system and by electronic mail as indicated.

/s/ Jason Snyder

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